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# Supreme Court of the United States

BRIEF OF AMICI CURIAE, LAWRENCE WESTBROOK AND HEINZ PULVERMANN

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS,
*Petitioner*
v.
UNITED STATES OF AMERICA,
*Respondent.*
No. 200

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

## BRIEF OF AMICI CURIAE

This brief of LAWRENCE WESTBROOK and HEINZ PULVERMANN as *amici curiae* is being filed pursuant to Rule 42 of the Rules of this Court, permission to the filing of such a brief having been granted by both the petitioner and the Government.

## INTEREST OF AMICI CURIAE

Both Westbrook and Pulvermann have a deep interest in the outcome of this case. This interest springs first from the fact that the breach of the contract by the Government between petitioner (Atlantica) and the Government has destroyed their right to compensation from Atlantica of $67,975,000 (Finding 165) — a right which Atlantica has acknowledged was "incurred, as a matter of law, upon its

acceptance of the defendant's purchase contract and was not extinguished by the defendant's breach of that contract." (Petitioner's Second Motion for Rehearing before the Court of Claims, p. 2.) This very substantial right could obviously not be satisfied out of the judgment for $500,200.00 rendered by the Court of Claims.

Secondly, the Government has filed a conditional cross petition for certiorari (No. 383) challenging the standing of Westbrook and Pulvermann as bona fide employees of sales agencies of Atlantica, claiming that Westbrook and Pulvermann were so-called "five percenters" within the meaning of Article XVII of the contract in issue and thus raising issues as to the integrity and standing of Westbrook and Pulvermann in opposition to the specific findings of the court below that these gentlemen were bona fide employees of Atlantica and had rendered substantial service to that company. (Findings 135-137, 6-10.)

It was because of these interests—their theoretical dismission by the court below but their practical denial so far as damages are concerned—that Westbrook and Pulvermann after the judgment below took the extraordinary course of filing a motion to intervene in the court below, which motion was denied.

## ARGUMENT

### Position of Westbrook and Pulvermann

The position of Westbrook and Pulvermann is that the petition of Atlantica for a writ of certiorari should be granted inasmuch as the decision below by applying the wrong rule of damages deprives them of very substantial rights. On the issue of the grant of the cross petition for certiorari by the Government, they neither oppose nor support it. They are confident that any review of the record in this case will support their position as bona fide employees

## The Rule of Damages Applied by the Court Below

Westbrook and Universal contend that the Court of Claims applied a rule of damages in direct conflict with the applicable rule of the difference between the contract and market prices as set forth by this Court in *United States v. Burton Coal Co.*, 273 U. S. 337, an express ground for the granted certiorari (Sup. Ct. Rule No. 19, 2), the absence of the apparent plain applicability of the *Burton* rule, evidence as to the costs of performance were introduced by Atlantic, and [illegible] that the record below is [illegible] to justify the [illegible] the Court below [illegible] the costs of performance [illegible] and [illegible] justify the remand of this case to the Court of Claims for the *Burton* rule were deemed inapplicable and the [illegible] rule to be applied would be the difference between the contract price and the cost of performance. As this Court's review of the findings of the court below is limited to [illegible] *United States v. Wilson*, 385 U. S. 190, 207 [illegible] of the existing scope of review possessed by this Court, the [illegible] below [illegible] to the Court.

### (1) Applicability of the *Burton Coal* rule.

The applicability of the *Burton Coal* rule [illegible] as has been already set forth in petitioners' brief [illegible] and [illegible] is [illegible]. Here, as in *Burton*, [illegible] was bound to deliver the quantity of coal [illegible] by the contract." *Burton Coal*, supra

n. 340. Here, as in *Burton Coal*, "there was no contract relation between appellant [Atlantica] and any of the supplying companies. Their default would not make them liable to appellant [the Government] or relieve appellee [Atlantica] from the obligation to deliver coal [tungsten] to appellant [the Government]." *Ibid.* Here, as distinguished from *Burton Coal* the contract did not specify certain mines from which the production was to be made. *Id.* 338. Indeed, the final contract of September, 1952 did not restrict Atlantica's supply to any specific mines. Here, as distinguished from *Burton Coal Id.* 338 n. 1, there was no requirement that the ore contracted for must come from certain specified mines unless production at these mines was halted by *force majeure*. On the contrary, it was recognized by both parties from the outset that substantial quantities of tungsten would have to be acquired from other sources, primarily pillage, small independent producers and to meet the requirements of the contract to fulfill the economy contemplated by the ultimate requirements for delivery of tungsten. (Findings 135, Tr. 141 Dec. 153 footnote 59.)

Admittedly, the contract on the part of the Government contemplated the acquisition of tungsten concentrates as well as the procurement of tungsten concentrates in specific and from the standpoint of the contract it was desirable to increase the productivity of its supplying companies and of any other small Portuguese producers (the pillagers). This is the thought and the only thought expressed in the preamble to the contract. But that thought cannot be tortured, as the Government contends, into transforming a contract for sale into a contract for production. Nor can the so-called anti-speculation clause contained in Article XX (d) be interpreted to restrict the tungsten supply available to Atlantica. See e.g. the elimination of such a suggestion in a preliminary draft, determinated Draft

X of the contract. Finding 95(c).) To interpret the anti speculation clause of Article XX(d) to impose such extensive restrictions has simply no justification. Neither the court below nor the Government cites any precedent or any administrative practice to support such a sweeping construction of a default provision admittedly a standard and even a "boiler-plate" item. (Finding 139(a)(c), 90(a)(b).) The *direct* purpose of this Article XX(d) is far narrower and wholly insufficient to bring this case outside of the rule established in *Burton Coal*, where sources of production were specifically designated, as distinguished from this case where limitation to sources of production was definitely eliminated. (Finding 95(c).)

To distinguish this case from *Burton Coal* is impossible. Denial of certiorari consequently means that implicitly this Court is overruling *Burton Coal*. Far better, if this be the Court's opinion, would be the grant of certiorari and the conclusion reached openly and after argument that *Burton Coal* is a mistaken application of the law of damages governing the breach of a contract.

### (2) Reliance by Counsel for Atlantica on *Burton Coal*.

Counsel for Westbrook and Pulvermann have rarely in their experience seen two cases so closely on all-fours with each other as this case and *Burton Coal*. The differences that exist only strengthen the applicability of the rationale of *Burton Coal* to the instant case. No wonder that counsel for Atlantica presumed its applicability to this situation and handled his evidence on the assumption that the rule of *Burton Coal* would be the basis of the decision of the court below. (Finding 101, footnote 70.)

Counsel for the Government in their Brief in Opposition (p. 18) contend that the petitioner was specifically apprised of the fact that the Government held a contrary

position. To substantiate this point they refer to the testimony of a witness, Mooney, to be found in the Transcript, pp. 2210-2220. This reference, however, fairly read fails to prove the point. Admittedly, the witness offered in evidence a worksheet (Defendant's Ex. 60) that purported to deal with costs of production and containing no rationale upon which it was based. But, as the witness testified, the cost of operation of Atlantica, particularly of the acquisition of the tungsten ore by Atlantica, at a price of 60 escudos, upon which his calculations were based, was arbitrarily given to him by counsel for the Government. (Tr. 2276.) He had made no independent examination of these costs and consequently could not profitably be subjected to cross-examination on them, except with respect to his mathematical computations based on facts that he had been told to assume. The Government in its proposed findings makes only one short reference to these estimated costs. (Defendant's Proposed Finding No. 94.) Its chief effort in this connection was its contention that Atlantica did not have the ability to perform and that the rule of *Burton Ordnance* was not applicable.

Under these circumstances if the rule of damages to be applied is the difference between the contract price and the cost of production, petitioner's request for a remand should be granted to adduce adequate and reliable evidence as to such costs.

### (3) The Erroneous Calculation of Damages

Assuming that damages are to be measured by the difference between contract price and the cost of production, the calculation of the court below of these damages is erroneous on two grounds: (a) its reliance upon a purely assumed state of facts which bears little relation to the reality of the situation; and (b) its neglect of certain elements of damage actually incurred by Atlantica.

(a) (i) Damages were calculated on the basis that the contract called for deliveries of 3,630 short tons (Findings 155(d), 156, 167(b)) whereas Atlantica was entitled to deliver a maximum of 4,290 short tons. The Government's own expert, Lynton, who had made a field survey of the situation, expressed himself as quoted in Finding 84 as follows:

> "The results of the survey indicate that Atlantica can possibly meet a production of 500 metric tons in the first year, 800 in the second year, and 1400 in the third. This is on the basis of the present contracts, signed and pending, but Atlantica points out that additional operators have expressed a desire for an Atlantica contract as soon as the EPS purchase contract is signed. Such additional contracts might increase the available tonnage or assure the fulfillment of the figures quoted."

It is submitted that the limiting figure of 3,630 short tons has no basis in the evidence and should not have been utilized.

(ii) Damages were calculated on the basis that the cost to the petitioner of acquiring tungsten would be 60 escudos per kilogram, even though the Court specifically found that substantial quantities could have been acquired below that price. (Finding 162(a).) The 60 escudo conclusion can only rest on the Mooney testimony, heretofore referred to, which was based on cost of acquisition he was arbitrarily told to assume by counsel for the Government. (R. 2276.) The 60 escudo price cannot rest on prices alleged to have been in the subcontracts made by Atlantica with the suppliers. In December, 1951, thirteen supply contracts had been submitted to the United States Embassy in Portugal and to the Government Procurement Agency for the purpose of satisfying the Government of Atlantica's

ability to perform. These contracts contained an initial price of 70 escudos per kilogram. At the time of their submittal to the Government, Westbrook and Pulvermann informed the Government that these contracts were being submitted solely for the purpose of showing Atlantica's ability to perform and would in all likelihood be substituted by others on more favorable terms by the time Atlantica's program was finalized. (Tr. 1095, 1304-5.)

On February 25, 1952, eleven of these contracts were revised to reduce the initial price from 70 to 60 escudos for the first three years and 50 escudos for the fourth and fifth years. (Plaintiff's Exhibit 27.) These revised contracts were not submitted to the Government. At the time the 60-50 escudos price was incorporated in these 5-year contracts it was contemplated by Atlantica that the Government would issue a divisible letter of credit so as to enable the supply companies to buy the new equipment for mechanization themselves. (Plaintiff's Ex. 24.) Three days after the signature of these revised contracts, the Government concluded that an indivisible letter of credit must be the basis for the prime contract and that the term should be reduced to three years. (Plaintiff's Ex. 173.) These and other changes required by the Government consequently required renegotiation of these contracts which no longer were applicable to the changed situation.

From that time on no further prices were negotiated between Atlantica and its supply companies. Nor were any final commitments made as to quantities. Indeed, as of the time of the finalization of the prime contract no supply contracts were in existence, Atlantica having given up trying to adjust prices and terms from the suppliers to the varying views of the Government. (Tr. 773-781, 801-803, 822-823, 847-848.) It contented itself with relying on the commitment of its suppliers to participate in the program. As

Lynton, the Government's expert reported in May of 1952 prices to be paid to the supply companies were not determined but would be "sufficiently less than that received from EPS so that Atlantica can make a fair profit on its handling of the tonnage, its resale and amortization of its equipment." (Finding 84.)

(iii) Damages as calculated included as a cost of production the Portuguese export tax of 40 escudos per kilogram. (Finding 104.) Alleviation of this tax to a certain degree had, however, been promised by the Portuguese Ministries of Finance and Economy. (Tr. 508-512, 751, 753, 872-874. See also Tr. Portuguese Hearings, 326.) Its full impact should not therefore have been considered a cost of production.

(iv) The damages as calculated included as an element of cost the fees payable to Westbrook and Pulvermann (Finding 105) for which Atlantica was legally committed upon the signing of the contract—a legal commitment that is not destroyed by the fact of nonperformance. *Restatement of the Law of Agency*, § 455, comment d; *Albright* v. *Kalbitzer*, 62 F. Supp. 815. This neglects the fact that the fees due Westbrook and Pulvermann are not elements of cost but represent their share as co-venturers of the potential profits under the contract. If regarded as an element of cost, since Atlantica was legally committed to pay them, the award of damages should have been such as to compensate Atlantica for the liability it assumed.

(v) (a) Secondly, the damages as calculated fail to take into account basic costs that would have been incurred by the petitioner which could reduce the "anticipated profit" as determined by the lower court to a figure that would make absurd any such calculation of $508,200.00 as Atlantica's estimated profit. No figure for rents, communication, or

overhead other than salaries, is included. (Finding 166.) Nor is there any figure in the calculation representing large investments of about $1,700,000 in machinery and equipment (Finding 160(a)) which Atlantica, because of the indivisible letter of credit, would be bound to make, and which would necessarily call for amortization and interest payments in part or in whole over the life of the contract.

(iii) The breach of the contract by the Government, particularly because of the manner of that breach whereby Westbrook and Pulverbaum, were charged by the Chief Executive of the Government with being "five-percenters," and thus reflecting upon the integrity of the entire Portuguese enterprise, destroyed Atlantica as a potentially operating entity. Its revival appears impossible. Some element of damage beyond those normally recoverable appears justifiable under the familiar rule that the person guilty of a breach of contract should be liable for consequences clearly foreseeable at the time of the breach.

In short, on the assumption that the rule of *Hurley Coal* is not applicable, this record, for the reasons above advanced, provides insufficient evidence to enable any adequate determination of the "profit" derivable from the prime contract in the period of performance, 1953-1955 or of the total damages incurred by Atlantica. Indeed the court below recognizes this fact. The correction of the admitted inadequacies in this case can only be achieved by an appropriate remand to the court below.

## The Government's Cross-Petition

The Government's cross-petition for certiorari [illegible] to raise the issue of a violation of Article XVII of the contract, which embodies the basic provisions of Section 304 of the Federal Property and Administrative Services Act of 1949, 41 USC A § 254(a).

Westbrook and Pulvermann, whose reputation for integrity was put in issue to their own great detriment by the manner in which the Government chose to commit a breach of this contract, are not averse to this Court again reviewing this issue. To have the exoneration given them by the findings of the lower court underwritten by this Court would help to erase to some degree the stigma that in 1952 the Government sought to attach to their activities and their reputations.

Westbrook and Pulvermann feel confident that this Court will not disturb the findings of the lower court. This issue, as distinguished from the issue of damages, was fully and thoroughly explored during the lengthy hearings. Both Westbrook and Pulvermann voluntarily testified and withheld nothing in the way of testimony or documents from the Commissioner. They wanted to and did vindicate themselves.

The findings of the court below on this issue are comprehensive. (Findings 6, 7, 10, 135-137.) Westbrook and Pulvermann's contract with Atlantica was from the start made available and filed with the contracting agency of the Government. The extraordinary efforts put in by Westbrook and Pulvermann in the progress of negotiating the contract, their peculiar talents to handle the various phases of this endeavor, their continuing responsibility for overseeing the performance of this contract in close cooperation with Atlantica, their contemplated use to bring other business to Atlantica from other nations in other products, all these are fully spelled out both on the record and in the findings. Because of the high stakes involved in this case the Government expended every effort in its attempt to impute motives to these men that would enable the Government to avoid [illegible] of the provisions of Article XVII. In this the Government [illegible]

the lower court. It is not necessary in our judgment for this issue to be reviewed, but Westbrook and Pulvermann have no fear of such a review.

## Conclusion

Wherefore, Westbrook and Pulvermann pray that a writ of certiorari be directed by this Court to review the judgment in this case by the Court of Claims; such writ to have such a scope of review as to this Court, in the light of the petition and cross-petition, may seem just and wise.

Respectfully submitted,

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